Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 90.631	)	
Of The Commission's Rules To	)	RM-
Eliminate The Trunked System	)	
Five-Year Loading Requirement	)	

To: The Commission

REQUEST FOR STAY
OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

By: _____

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CCB

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The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to Section 1.44(e) of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations[1], respectfully requests the Commission stay immediately all channel recovery actions based on Section 90.631(b) of the FCC rules,[2] pending final action on the Association's concurrently filed Petition for Rulemaking ("Petition"). In support, the following is shown:

I. INTRODUCTION

1. Section 90.631(b) of the Commission's Rules specifies the loading requirement applicable to trunked systems. It provides that applicants must certify that a minimum of seventy (70) mobiles for each channel authorized will be placed in operation within five years of the initial license grant. If at the end of five years the trunked system is not loaded to the

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[1] 47 C.F.R. § 1.44(e).

[2] 47 C.F.R. § 90.631(b).

prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to one hundred (100) mobiles per channel cancels automatically. The Commission has adopted a transition period, imposing the five-year loading requirement only for systems licensed before June 1, 1993. All licensees authorized initially before that date which are within their original license term are subject to this condition. Systems licensed after that date will be permitted to retain all constructed, operational frequencies, irrespective of their level of utilization.

2. As AMTA explains in its Petition, the best interest of the industry, the FCC, and the public will be served by the immediate elimination of this requirement. While it could be perceived as inequitable to change this type of fundamental requirement after numerous parties have been adversely affected, that result will occur in any event because of the already adopted "sunset" provision. The change proposed by AMTA will simply accelerate the point at which the Commission would "level the playing field" for all trunked licensees, whether granted before or after the arbitrary June 1, 1993 date. Further, because of the significant harm which may befall a licensee unable to satisfy the rule, AMTA requests the Commission to stay the enforcement of the rule until it concludes consideration of AMTA's concurrently filed Petition.

II. DISCUSSION

3. The traditional test for a stay requires consideration of four elements. They are, whether the proponent of the stay has: (1) advanced a substantial case on the merits; (2) shown that it will suffer irremediable harm if a stay is not granted; (3) shown the absence of harm to other parties; and (4) shown that the public interest would not be harmed by a stay. See Virginia Petroleum Hobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958). AMTA

has met all four parts of the test:

1. **AMTA has Advanced a Substantial Case on the Merits.**

4. As AMTA explains it its Petition, it is no longer necessary to use stringent loading standards to assure appropriately intensive spectrum usage by SMR systems. The marketplace in which these systems operate effectively mandates that spectrum be used to serve customers, rather than be warehoused. Virtually all geographic areas in the nation, even essentially rural areas, are served by a variety of system operators diligently marketing their service to as broad a customer base as possible. The burgeoning SMR market, far from tolerating frequency hoarding, has exerted pressure on operators to use their assigned spectrum intensively. Moreover, there is no rational basis for distinguishing between systems licensed initially before versus after June 1, 1993, in respect to system loading.

2. **SMR Licensees Authorized Before June 1, 1993 and the Customers They Serve Will Suffer Irremediable Harm if a Stay is Not Granted.**

5. As AMTA explains in the Petition, most urban systems have reached their five-year loading deadlines and have either satisfied the loading requirement or had channels recovered. More rural systems were not typically at risk in the past because channel recovery actions based on loading were triggered by spectrum shortages. If no waiting list existed, frequencies were not recoverable at the five-year date. More recently, an extraordinary interest in SMR spectrum on the part of traditional SMR operators, wide-area applicants and purely speculative application mill-generated filings have created spectrum deficiencies in areas where available capacity remains significantly underutilized. Customers in many of these markets need substantial interconnect capability in addition to, or even in lieu of, dispatch service. Systems in those areas may be serving their particular communities well, with an appropriate menu of

service offerings, and yet be incapable of satisfying an urban-focused, dispatch-oriented loading standard. Having invested in full system implementation, these licensees would nevertheless be irremediably penalized by the cancellation of their "under-loaded" channels. Further, the customers on systems which lose underloaded channels will be relegated to an inferior quality of service on a now overloaded system since the FCC Rules penalize such systems by allowing them to retain only one frequency for every hundred (100) units or fraction thereof.

3. **A Stay Will Not Cause Harm to Those SMR Licensees Authorized After June 1, 1993.**

6. In contrast, those SMR licensees authorized after June 1, 1993, will not be harmed by a grant of this stay request. Those systems are already beyond the reach of the Section 90.631(b). These systems are permitted to retain all constructed, operational frequencies, irrespective of their level of utilization.[3] Licensees which have had channels recovered in the past will not be further injured by a Commission grant on further enforcement activities and may even benefit, since other authorizations of those same licenses might fall with this category.

3. **The Public Interest Will Be Served Best By a Stay.**

13. As explined in AMTA's Petition, the Commission is entering an era of unprecedented austerity in respect to budget, manpower, and all other resources. Each of its programs must be scrutinized closely to determine both its cost and its likely benefit. In AMTA's opinion, the ongoing extensive use of the short-spacing provisions in the FCC's rules have made the five-year loading assessment an academic, typically fruitless exercise in the very

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[3] Id.

markets in which channel recoveries might otherwise have been productive.

14. As further described in AMTA's Petition, the FCC's rules permit channel recovery for failure to load fully only in wait-listed markets. Even there, the Commission will take frequencies back only if they can be reassigned to a pending applicant in conformance with the normal co-channel separation standard specified in FCC Rule Section 90.621(b).[4] That separation typically requires seventy (70) miles between co-channel systems.

7. Because short-spacing has become relatively commonplace, and because the FCC will reassign recovered channels only on a routine seventy (70) miles basis, the FCC often undertakes a loading analysis only to discover that the underutilized channels are not able to be assigned to a wait list applicant because they have already been short-spaced in that area. Thus, loading analyses more and more frequently are ineffective at accomplishing the reassignment of underutilized frequencies. The benefits of continued enforcement have become outweighed by the associated administrative costs.

16. As previously mentioned, there is no rational basis for distinguishing between systems licensed initially before versus after June 1, 1993, in respect to system loading. This arbitrary dividing line has the effect of creating a two class SMR industry with no discernible public interest basis. It creates a situation whereby two otherwise identical systems in the same market, perhaps at the same site, will be subject to dramatically different requirements only because one was picked up from the processing pile on May 31st and the other on June 1st. While this inherently inequitable situation will exist irrespective of the "cutoff" date selected, the public interest and the industry will be better served by correcting the imbalance at the

[4] 47 C.F.R. § 90.621(b).

earliest opportunity.

V. CONCLUSION

17. AMTA has supported the Commission's efforts to promote the full utilization of limited spectrum resources. Nonetheless, the Association urges the FCC to stay immediately all channel recovery actions based on Section 90.631(b) of the FCC rules.[5] Stay of that rule pending decision on AMTA's Petition will achieve the Commission's objective without jeopardizing unreasonably the rights of legitimate SMR licensees.

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[5] 47 C.F.R. § 90.631(b).

CERTIFICATE OF SERVICE

I, Lisa K. Jackson, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify, that I have on this 29th day of October, 1993 caused to have hand-delivered and federal-expressed a copy of the foregoing **REQUEST FOR STAY** to the following:

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